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IN THE
Supreme Court of the United States

Term,

No. 134

PAUL L. WILLITS ET AL.,
Appellants

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee

PHILADELPHIA ELECTRIC COMPANY,
Intervening Appellee

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS APPEAL

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IN THE SUPREME COURT OF THE UNITED STATES

Term,

No.

Paul L. Willits et al.,
Appellants

v.

Pennsylvania Public Utility Commission,
Appellee

Philadelphia Electric Company,
Intervening Appellee

I.

MOTION TO DISMISS APPEAL

Pennsylvania Public Utility Commission, by Jack F. Aschinger, Howard L. Criden, Assistant Counsel, and Thomas M. Kerrigan, Acting Chief Counsel, moves the Supreme Court of the United States to dismiss the appeal of Paul L. Willits et al., from orders of the Pennsylvania Public Utility Commission as affirmed by the Superior Court of Pennsylvania in *Paul L. Willits et al. v. Pa. P.U.C. et al.*, 183 Pa. Superior Ct. 62, 128 A. (2) 105 (1956), the Supreme Court of Pennsylvania denying "Per Curiam" on February 28, 1957, appellants' Petition in Appeal from the Opinion and Order of the Superior Court of Pennsylvania.

II.

NATURE OF THE CASE AND RULING BELOW

The opinion and order of the Superior Court, dated December 28, 1956, affirmed the orders of the Public Utility Commission approving applications of Philadelphia Electric Company to exercise, under the Act of May 21, 1921, P. L. 1057 (15 P.S. 1182), the right of eminent domain to acquire rights of way for the construction, operation, and maintenance of a line for transmission and distribution of electricity.

Under the Act of 1921, supra, light, heat, or power companies have the right of eminent domain. Among other provisions, it requires the preliminary approval of the Commission. On this point, the Act provides that before any such company shall exercise the power, the Public Service Commission (now Public Utility Commission) shall find and determine, after public hearing, that the service to be furnished by the company through the exercise of the power is necessary or proper for the service, accommodation, convenience, or safety of the public. (All damages shall be ascertained, recovered, and paid as provided by the Act of 1874, Section 41, in the Court of Common Pleas of the proper county.)

Following the Act of 1921, the Pennsylvania Superior Court had occasion to define the function of the Commission in a number of decisions. The grant of a certificate by the Commission approving the exercise of the power of eminent domain under the provisions

of the Act of 1921 does not determine the right of the utility to condemn the lands it desires to appropriate or the validity of the subsequent proceedings by eminent domain. It evidences only the preliminary approval of the Commission, and is a finding that the exercise of the power, if it exists, is necessary for the convenience, accommodation, or safety of the public. The selection of the route for the lines is a matter for the light company in the first instance, and unless it is shown that it proposes to exercise the power conferred upon it wantonly, corruptly, or capriciously, or that the rights of the landowner have been trifled with, or unreasonably disregarded, the law does not contemplate that the Commission should withhold its approval simply because another route might have been adopted. *Biddle v. P.S.C.*, 81 Pa. Superior Ct. 350 (1923); *Kulp v. P.S.C.*, 82 Pa. Superior Ct. 83 (1923); *Reiber v. P.S.C.*, 83 Pa. Superior Ct. 507 (1924); *Dickson v. P.S.C.*, 89 Pa. Superior Ct. 126 (1926); *Wilson v. P.S.C.*, 89 Pa. Superior Ct. 352 (1926); *Biddle v. P.S.C.*, 90 Pa. Superior Ct. 570 (1927); *Westside Electric St. Ry. v. P.S.C.*, 91 Pa. Superior Ct. 162 (1927); and *Dickel v. Bucks-Falls Elec. Co.*, 306 Pa. 504, 160 Atl. 115 (1932). The holdings of these cases have been followed more recently by our appellate courts without question: *Reed v. Pa. P.U.C.*, 174 Pa. Superior Ct. 132, 100 A. (2) 399 (1953); *Byers v. Pa. P.U.C.*, 176 Pa. Superior Ct. 620, 109 A. (2) 232 (1954); *Phillips v. Pa. P.U.C.*, 181 Pa. Superior Ct. 625, 124 A. (2) 625 (1956); and *Duquesne Light Co. v. Upper St. Clair*, 377 Pa. 323, 105 A. (2) 287 (1954).

The Superior Court of Pennsylvania in *Phillips v. Pa. P.U.C.*, 181 Pa. Superior Ct. 625, 124 A. (2) 625

(1956), ruled on the questions of necessity and selection of the route covering the proposed line here involved, and found in the instant cases involving the identical line that approval of the applications by the Commission was amply supported by the evidence and in conformity with the law.

Appellants sought an allowance of appeal in the Supreme Court of Pennsylvania. The Supreme Court refused to allow the appeal. Appellants now seek review by the Supreme Court of the United States.

III.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

(A) There is no jurisdiction, under the provisions of Title 28, U. S. Code, Section 1257(2) for this appeal.

The statutory provision which is relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States to review the decision involved is Section 1257(2) of Title 28, U. S. Code.

The portion of that section of the Judicial Code upon which appellant relies is that portion which reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> *(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.*" (Italics ours)

It is submitted that appellants' statement of the case merely goes to the amount of land appropriated by the proposed aerial line in comparison with underground construction and does not present a federal question for review within Section 1257(2).

The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed: *Ferry v. King County*, 141 U. S. 668, 35 L. Ed. 895 (1891). Speaking generally, it is for the state, primarily and exclusively, to declare for what local public purposes private property within its limits may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken: *Madison Traction Co. v. St. Bernard Min. Co.*, 25 S. Ct. 251, 49 L. Ed. 462, 196 U. S. 239 (1905); *Stone v. Southern Illinois & M. Bridge Co.*, 27 S. Ct. 615, 51 L. Ed. 1057, 206 U. S. 267 (1907).

(B) There is no substantial federal question presented in this appeal.

Appellants contend that they have been deprived of rights as guaranteed by the Constitution of the United States. Primarily they contend that the failure of the Commission to predicate its adjudication on the evidence is a violation of the 14th Amendment of the United States Constitution.

It is submitted that at all stages of the proceeding before the Pennsylvania Commission and the appellate courts of Pennsylvania, appellant had a full hearing, the right to file a brief, and the right to orally argue this matter before the Commission and Court, and full opportunity to meet all the issues in this proceeding. The right of review to determine whether the findings of the Commission are based upon substantial evidence or whether they are arbitrary, oppressive, and therefore in excess of its powers, and whether the order made is responsive to and justified by such findings, satisfies the requirement of due process: *Arkansas Wholesale Grocers' Ass'n. v. Federal Trade Com'n.*, 18 F. (2) 866 (1927), certiorari denied, 275 U. S. 533, 48 S. Ct. 30, 72 L. Ed. 411 (1927); *Asbury Truck Co. v. Railroad Commission of California*, 52 F. (2) 263 (1931), affirmed per curiam; 287 U. S. 570, 53 S. Ct. 94, 77 L. Ed. 501.

A proceeding merely involving the power and duty of the Pennsylvania Public Utility Commission, under the Act of 1921, to find and determine preliminarily

whether the service to be furnished by the company through the exercise of the right of eminent domain is necessary or proper for the service, accommodation, convenience, or safety of the public presents no exceptional features which justify special review.

Conclusion

The appeal of Paul L. Willis et al., should be dismissed because (1) there is no jurisdiction, under the provisions of Title 28, U. S. Code, Section 1257(2) for this appeal, and (2) there is no substantial federal question involved in this appeal.

Respectfully submitted,

JACK F. ASCHINGER
Assistant Counsel

HOWARD L. CRIDEN
Assistant Counsel

THOMAS M. KERRIGAN
Acting Counsel
For Pennsylvania Public
Utility Commission

CERTIFICATE OF SERVICE

I have this day mailed to all counsel of record herein copies of the within Motion to Dismiss in postpaid, properly addressed covers.

THOMAS M. KERRIGAN
Acting Counsel

Dated June 13, 1957